In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-206

JACOB J. PARKER, ET AL.,

APPELLANTS

v.

HOWARD B. LEVY

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

Relevant Docket Entries

Date	Proceedings
	United States District Court
April 19, 1969	Petition for writ of Habeas Corpus, with Exhibits A. and B.
April 19, 1969	Exhibit C. (Affidavits)
April 19, 1969	Application for Bail, Memorandum and Certificate of Service.
April 19, 1969	Motion for Production of Documents, Brief and Certificate of Service.
May 6, 1969	Order of Court, granting rule upon respondent, J. J. Parker, Warden, to show cause why a writ of habeas corpus should not be granted. Rule returnable May 16, 1969.
May 7, 1969	Order of Court denying petitioner's application for bail. (S)
May 8, 1969	Notice of appeal filed by petitioner from the order denying bail entered in this action on 5-7-69.
May 8, 1969	Motion of petitioner to have privileged communications with counsel.
May 8, 1969	Memorandum in support of motion to have privileged communications with counsel.
May 8, 1969	Motion and Memorandum filed with court on 5/8/69 received in Clerk's office 5/12/69.
May 13, 1969	Order of Court, fixing time for argument on petitioner's motion to have privileged communications with counsel for Friday, May 23, 1969 at 11:00 a.m. in Court Room No. 1, United States Court House, Harrisburg, Pa. (S)

Date	Proceedings
June 3, 1969	Order (certified copy) of Court of Appeals, denying appellant's application for bail.
June 16, 1969	Order of Court, fixing time for filing traverse to "Respondent's Return to Rule to Show Cause and Answer to Petition for Writ of Habeas Corpus" on or before Thursday, July 3, 1969.
June 30, 1969	Memorandum and order that the motion of Howard B. Levy, petitioner, to have privileged communications with counsel is denied in all respects. (S)
July 3, 1969	Motion of Levy for disclosure of information obtained by eavesdropping, and certificate of service thereof.
July 24, 1969	Notice of Appeal from order of June 30, 1969, and notice of mailing thereof to counsel of record.
August 5, 1969	Order of Court, requiring admission to bail—ordered that petitioner be released in the custody of his counsel, Charles Morgan, Jr., provided that he execute a bond in the amount of $1,000.00 either secured by the undertakings of sufficient solvent sureties or by the deposit of an equal amount of cash or other security in lieu thereof. The conditions of said release and bond shall be limited to the following: (a) Petitioner shall appear in the U.S. District Court for the Middle District of Penna. and at such other places as petitioner may be required to appear in accordance with any and all orders or directions relating to petitioner's appearance as may be given or issued by the U.S. District Court or any other U.S. District Court to which the cause may be transferred, or any appellate court in which proceedings in this

Date	Proceedings
	cause are had. (b) Petitioner shall abide by any modification or reversal by the Supreme Court of the United States of the order of Mr. Justice Douglas dated August 2, 1969, and in this event, surrender himself forthwith or otherwise act in accordance therewith. (c) Petitioner shall not leave the continental limits of the United States. (d) Petitioner shall make certain that at all times his counsel, Charles Morgan, Jr., is apprised of his whereabouts. (e) If petitioner violates any of the conditions of this order, a warrant for his arrest will issue immediately. It is ordered that petitioner's release is further conditioned on his acceptance in writing of the above conditions
August 7, 1969	Order (certified copy) issued by Mr. Justice Douglas on August 2, 1969 admitting Mr. Levy to bail in the amount of $1,000.00 pending final determination of his application for a full court in October.
August 21, 1969	Memorandum opinion (corrected copy) of Mr. Justice Douglas issued August 2, 1969, in connection with application for bail.
October 15, 1969	Letter from Clerk of the Supreme Court of the United States. On October 13, 1969 the Supreme Court handed down the following order: "The application for bail granted by Mr. Justice Douglas pending action by this Court is continued pending disposition of the case by the United States District Court for the Middle District of Pennsylvania. Mr. Justice Marshall took no part in the consideration or de-

Date	Proceedings
	cision of this application." (Dated 10-13-69)
Mar. 3, 1970	Order that the argument on petitioner's motions for production of documents and disclosure of information obtained by eavesdropping is fixed for Monday, March 16, 1970, at 2:00 p.m., at the United States Courthouse, Scranton Pa. (S)
Aug. 21, 1970	Opinion and order denying petitioner's motions for production of documents and for disclosure of information obtained by eavesdropping. (S) (See Doc. 69)
October 21, 1970	Order amending opinion filed Aug. 21, 1970. (S)
Feb. 17, 1971	Order that Tuesday, March 16, 1971, at 11:00 a.m., Wilkes-Barre, Pa., is fixed as the time and place for hearing on the petition for writ of habeas corpus. (S)
Mar. 15, 1971	Application of Howard B. Levy for reconsideration of the denial of a Motion for Production of documents.
June 30, 1971	Memorandum and order-in accordance with memorandum this day filed, it is ordered that the petition for a writ of habeas corpus be and the same is hereby denied. (S)
June 30, 1971	Order of Court; it is ordered that petitioner's motion, filed March 15, 1971, for reconsideration of the denial of petitioner's motion for production of documents is hereby denied. (S)
Aug. 25, 1971	Notice of appeal filed by Howard B. Levy, and Certificate of service thereof. Copy of Notice of appeal mailed to the U.S. Court of Appeals.

Date	Proceedings
	United States Court of Appeals
Oct. 4, 1971	Copy of Notice of Appeal received. August 27, 1971, filed.
Apr. 18, 1973	Opinion of the Court (Seitz, Chief Judge & Aldisert & Rosenn, Circuit Judges) with separate opinion by Seitz concurring in part and dissenting in part, filed.
Apr. 18, 1973	Judgment reversing the judgment of the D. C. filed June 30, 1971 and remanding the cause for the purpose of issuing the writ of habeas corpus unless within ninety days of the date hereof the appropriate military authorities shall grant to Howard B. Levy a new trial on the Article 90 charge, in accordance with the opinion of this Court with costs taxed against appelles, filed.
May 10, 1973	Certified judgment in lieu of formal mandate issued, filed.
May 16, 1973	Notice of appeal by appellees to the Supreme Court of the United States pursuant to Title 28, U.S. Code Section 1252, filed.
July 13, 1973	Motion by appellees to stay that portion of this Court's order and Mandate of of 4/18/73 etc., filed. (4cc) service attached.
July 17, 1973	Appellant's opposition to appellee's motion to stay portion of this Court's order and mandate, etc., filed. (4cc) service attached.
July 19, 1973	Copy of letter dated July 17, 1973 which advises counsel that etxension of time to docket appeal in S.C. granted to July 30, 1973, received from Clerk of Supreme Court.

Date	Proceedings
July 26, 1973	Order (Seitz, Chief Judge and Aldisert and Rosenn, Circuit Judges) recalling the mandate issued on May 10, 1973; staying the issuance of the mandate on the condition that an appeal be docketed on or before July 30, 1973; no further extensions will be granted, See Rule 18(1) of the Rules of the Supreme Court of the United States, filed.
July 26, 1973	Certified copy of above order to Clerk of Supreme Court.
Aug. 3, 1973	Notice of filing (on July 30, 1973) of petition for writ of certiorari, received from Clerk of Supreme Court, filed. (S.C. No. 73-206)
Oct. 29, 1973	Certified copy of Supreme Court order dated October 23, 1973 postponing the consideration of the question of jurisdition to the hearing of the case on the merits, directing the case be set for oral argument in tandem with No. 72-1713, received from Clerk of Supreme Court, filed. (S.C. No. 73-206)

THE CHARGES AND SPECIFICATIONS AGAINST APPELLEE

CHARGE I: Violation of the Uniform Code of Military Justice, Article 90.

Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces AidMen in dermatology in accordance with Special Forces *AidMen (Airborne), S-R-F16, Dermatology Training*, did, at the United States Army Hospital, Fort Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, wilfully disobey the same.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children", or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces.

ADDITIONAL CHARGE I: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,'" or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight", or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel perorming duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his im-

mediate supervision and control, as follows: "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army.

ADDITIONAL CHARGE II: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBienPhu'. I am, however, 'deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there & would refuse to serve there if I were so assigned. . . ."

"The only question that remains, is essentially 1) were we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition. . . ."

"Is Communism worse than a U.S. oriented Government? . . . Are the North VietNamese worse off than the South VietNamese? I doubt it . . ."

"Geoffrey who are we fighting for? Do you know? Have you thought about it? You're real battle is back

here in the U.S. but why must I fight it for you. The same people who suppress Negroes and poor whites here are doing it all over again all over the world and your helping them. Why? You, no doubt, know about the error the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the VietNamese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy, Diem, Trujillo, Batista, Chang Kai Shek, Franco, Tshombe . . . Bull Shit?..."

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a VietNamese. At least the Viet Cong have that on their side . . . Geoffrey these people may not be sophisticated (American Style) but their grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them....",

or words to that effect.

ADDITIONAL CHARGE III: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing United States foreign policy as a "diabolical evil" designed more to protect

selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and the United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor writes; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr., for fighting with the United States Army in Viet Nam; (8) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the VietNamese people at heart, in violating of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

• • • • •

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,

PETITIONER

v.

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,

RESPONDENTS.

No. 1057 H.C.

[Filed Apr. 19, 1969]
T. H. Campton, Clerk
Per. .....
Deputy Clerk

PETITION FOR WRIT OF HABEAS CORPUS

The petition of HOWARD B. LEVY respectfully shows:

1.

Petitioner applies for a Writ of Habeas Corpus because he is imprisoned at the Lewisburg Prison Farm in the custody of the respondent Jacob J. Parker, Warden of the United States Penitentiary, Lewisburg, Pennsylvania. Certain documents relative to petitioner's cause are in the possession of or are subject to the control of the respondent, Stanley R. Resor, as Secretary of the Army.

2.

The cause of petitioner's imprisonment is a judgment of conviction rendered by general court-martial at Fort Jackson, South Carolina June 2, 1967. On June 3, 1967, this conviction resulted in a sentence of three years confinement at hard labor, dismissal from the service, and forfeiture of all pay and allowances.

3.

Petitioner is in custody under or by color of the authority of the United States, in violation of the Constitution, laws or treaties of the United States. Jurisdiction is conferred

on this court by 28 U.S.C. § 2241. Ancillary jurisdiction is conferred on this court by the Voting Rights Act of 1957, especially 42 U.S.C. § 1971(b) and (d), and the Voting Rights Act of 1965, especially U.S.C. § 1973i and 1973j.

4.

Intra-military remedies have been exhausted.

5.

No prior application challenging post-conviction detention on the within grounds has been made to any court.

6.

Petitioner was convicted of violating Articles 90, 133 and 134 of the Uniform Code of Military Justice (UCMJ) (10 U.S.C. §§ 890, 933 and 934, respectively).

a. Under Article 90 UCMJ (which provides in pertinent part "Any person subject to this chapter who . . . willfully disobeys a lawful command of his superior commissioned officer; shall be punished . . . by such punishment other than death as a court-martial may direct") petitioner was charged with the following:

> "Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, having received a lawful command from Colonel Henry F. Fancy, his superior officer, to establish and operate a Phase II Training Program for Special Forces Aidmen in dermatology in accordance with *Special Forces Aidmen (Airborne), 8-12-F16, Dermatology Training*, did, at the United States Army Hospital, Fort Jackson, South Carolina, on or about 11 October 1966 to 25 November 1966, willfully disobey the same."

b. Under Article 133 UCMJ (which provides in pertinent part "Any commissioned officer . . . who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct") petitioner was charged with the following:

"Specification: In that Captain Howard B. Levy,

United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at the United States Army Hospital, Fort Jackson, South Carolina, at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients, as follows: "I will not train special forces personnel because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children,' " or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: "I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I woull refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight," or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: "The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey," or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing

of enlisted personnel performing duty under his immediate supervision and control that "I hope when you get to Vietnam something happens to you and you are injured," or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army."

c. Under Article 134 UCMJ (which is entitled "General Article" and provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.")

petitioner was charged with the following:

"Specification: In that Captain Howard B. Levy, U.S. Army, Headquarters & Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlised personnel at divers times: "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and chil-

dren", or words to that effect, which statements were disloyal to the United States, and prejudicial to good order and discipline in the armed forces."

7.

Additionally petitioner was charged with violating Articles 133 and 134 UCMJ due to a single letter which he wrote on September 10, 1965 to a serviceman in Vietnam. The court-martial heard the evidence introduced under these charges, heard argument based thereon prior to its verdict, and convicted on a lesser included offense. After return of the verdict but prior to sentencing these charges were dismissed upon motion of the prosecution. These charges and their specifications are set forth in Exhibits A 1 and A 2. A copy of the letter upon which they were based is attached as Exhibit A 3.

8.

Petitioner's trial resulted in a conviction in violation of the first, fourth, fifth, sixth, and ninth amendments of the Constitution of the United States and Article III, Section 2, Paragraph 3 of said Constitution as hereinafter more fully set forth, said violations being of such magnitude and importance as to taint the entire proceeding and result in the loss of jurisdiction by the court-martial.

9.

Petitioner's attempts to raise the federal constitutional questions herein set forth were frustrated or, if ruled upon, were ruled upon in violation of and contrary to the applicable provisions of the Constitution and laws of the United States. The errors assigned in the intra-military appeals process are set forth as Exhibit B, hereto.

10.

Articles 90, 133 and 134 UCMJ were unconstitutionally applied to petitioner in that:

a. They would not have been applied but for petitioner's political and racial beliefs and expressions;

b. Their application having been undertaken, the charges were elevated from non-judicial punishment to general

court-martial status due to matter contained in a G-2 Dossier only 80 of the 180 pages of which were provided petitioner's civilian counsel (who was retained as his Chief Defense Counsel and was a member of the bars of state and federal courts, and the Supreme Court of the United States), the remaining 100 pages being suppressed and denied to petitioner and such counsel;

c. The charges were based upon petitioner's pre-service political activities and expressions;

d. The court-martial was activated because of petitioner's out-of-uniform efforts to register Negro citizens to vote in the State of South Carolina (see, *e.g.*, affidavits filed simultaneously herewith in a separately bound volume labeled Exhibit C, Affidavits" and by reference made a part hereof);

e. Petitioner having moved for a severance of trial on the charge under Article 90 UCMJ, he was unconstitutionally denied the right to have that charge considered apart from the other four charges—the pure speech charges—which brought before the court-martial material prejudicial to defendant and irrelevant to that charge; and curtailed or denied petitioner's right to choose whether to remain silent or testify on his own behalf.

11.

Additionally, Article 90 UCMJ was unconstitutionally applied to petitioner in that:

a. The order required petitioner, a physician, to train in medicine non-medical personnel (combat troops) in violation of accepted standards of medical ethics;

b. The order required petitioner to reveal the medical secrets of his patients to non-medical personnel (combat troops) in violation of accepted standards of medical ethics;

c. The Law Officer having ruled that petitioner was entitled to defend against this charge on the ground the order was not "lawful" in that its execution would involve him and the trainees in the commission of war crimes, then refused to allow the presentation of proof thereof to the court-martial;

d. The order was issued in order to punish petitioner for unorthodox but constitutionally protected thought and speech;

e. The order was issued as a result of petitioner's off-base out-of-uniform participation in Negro voter registration activities.

12.

Articles 133 and 134 UCMJ are unconstitutional on their face in that they are overbroad and vague and as a result thereof violate the first and sixth amendments and the due process clause of the fifth amendment of the Constitution of the United States.

13.

Articles 133 and 134 were unconstitutionally applied to petitioner in this case in that:

a. They were selectively applied in order to silence dissent;

b. They were applied solely to punish unorthodox thought and speakers;

c. Their application was based upon petitioner's political and racial beliefs and expressions;

d. Their application having been undertaken, the charges was elevated to general court-martial status due to matter contained in a G-2 Dossier only 80 of the 180 pages of which were provided petitioner's civilian counsel, the remaining 100 pages being refused petitioner and such counsel;

e. The charges were based upon petitioner's pre-service political activities and expressions;

f. The court-martial was activated because of petitioner's out-of-uniform efforts to register Negro citizens to vote in the State of South Caolina (see, *e.g.*, Exhibit C, Affidavits, *supra*);

g. Petitioner having moved for a severance of trial on the charges, he was unconstitutionally denied the right to have the speech charges considered apart from the order charge, and the right to have the charges purportedly based upon oral statements at Fort Jackson (paragraphs 6b and 6c, *supra*) and the charges purportedly based on a letter to a soldier in Vietnam (paragraph 7, *supra*), considered apart from the order charge (paragraph 6a, *supra*), all of which brought before the court-martial material prejudicial to defendant and irrelevant to other charges, and curtailed or denied petitioner's right to choose whether to remain silent or testify on his own behalf.

14.

Articles 133 and 134 UCMJ were unconstitutionally applied in that specifications drawn thereunder were overbroad and vague and as a result thereof violated the first amendment, the due process clause of the fifth amendment and the notice provision of the sixth amendment of the Constitution of the United States; additionally, such specifications were violative of the Constitution on the grounds set forth in Paragraph 10 hereof.

15.

Further, petitioner was unconstitutionally tried in that:

a. he was denied the right to trial by jury;

b. he was denied the right to compulsory process;

c. he was denied the right to confrontation of his accusers;

d. he was denied the right to effective civilian counsel;

e. he was subjected to trial by *ex post facto* law and subjected to a bill of attainder or pains and penalties;

f. he was tried by a court-martial from which medical personnel, women, and persons of rank the same as or below him were excluded by regulation and practice;

g. he was tried in a system of justice controlled by a commanding general in that military personnel—the investigating officer, the staff judge advocate, defense and prosecution attorneys, the members of the court-martial, and most of the witnesses—were subject to his discretionary appointment, control and promotion and said commanding general ordered the court-martial to convene;

h. he was judged by the law of war, no war having been declared and the oath administered to court members thereunder being undecipherable;

i. he was tried under the UCMJ by military authorities, the system of justice provided thereby being in violation of the Bill of Rights of the Constitution of the United States, the sole exception being the grand jury clause of the fifth amendment.

16.

Petitioner was unconstitutionally convicted under Articles 133 and 134 UCMJ in that:

a. The clear and present danger test was not, in fact,

applied to the speech charges, a "reasonable and natural tendency of the words" standard adopted from a manslaughter charge being used instead;

b. There was no evidence of a clear and present danger;

c. There was no evidence that petitioner's statements were made in a manner other than privately or informally, opinions so expressed being protected by Army Regulation 600-20, Paragraph 42.

d. There was no evidence upon which a conviction could be based.

17.

Petitioner's sentence with allowance for good time served will expire in August, 1969.

18.

Simultaneously herewith the following are being filed:

a. An application for bail pending hearing on this petition for Writ of Habeas Corpus and a Memorandum of Authorities thereon;

b. A motion directed to respondent Resor to produce the entire G-2 Dossier compiled on petitioner and other documents which are in respondent Resor's possession or subject to his control;

c. The entire 19 Volume Record of the trial of petitioner and the post-trial review by the staff judge advocate;

d. A three-volume Appendix of Extracts from the Record;

e. Exhibit C, Affidavits, referrable hereto;

f. A Compendium of reported and unreported decisions, opinions and orders relating hereto;

g. A Brief on the Merits.

WHEREFORE, petitioner prays for the following relief:

(i) that a Writ of Habeas Corpus issue herein directed to the respondent Parker, commanding him to produce the body of the petitioner, HOWARD B. LEVY, before this court at a time and place to be specified in such writ, so that this Court may inquire into the cause of petitioner's detention, and commanding respondent not to allow the transfer of petitioner to any other place (except the United States Prison Farm at Allenwood, Pennsylvania, which is within the jurisdiction of this Court and the inmates of which are

subject to the custody of respondent Parker) or more restrictive condition of confinement, pending final hearing and determination of this application and any appeals therefrom;

(ii) that petitioner be admitted to bail pending a hearing and determination of this cause;

(iii) that this Court, after a full and complete hearing, order petitioner discharged from custody;

(iv) for such other and further relief as may be just and proper.

HOWARD B. LEVY, Petitioner
By s/ Charles Morgan, Jr.
CHARLES MORGAN, JR., his attorney
Five Forsyth Street, Northwest
Atlanta, Georgia 30303

REBER F. BOULT, JR.
Morris Brown
Five Forsyth Street, Northwest
Atlanta, Georgia 30303

LAUGHLIN MCDONALD
17 South Circle Drive
Chapel Hill, North Carolina

GEORGE W. DEAN, JR.
P.O. Box 248
Destin, Florida

AMBROSE CAMPANA
36 West Willow Street
Williamsport, Pennsylvania

Attorneys for Petitioner

ANTHONY G. AMSTERDAM
School of Law
University of Pennsylvania
Philadelphia, Pennsylvania

ALAN H. LEVINE
BURT NEUBORNE
ELEANOR HOLMES NORTON
MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010

Of Counsel

EXHIBIT A

1. Additional Charge II: Violation of the Uniform Code of Military Justice, Article 133

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to impair and interfere with the performance of duty of a member of the military forces of the United States, did, at or near Columbia, South Carolina, on or about September 1965, conduct himself in a manner unbecoming an officer and gentleman by wrongfully and dishonorably communicating by mailing to Sergeant First Class Geoffrey Hancock, Jr., a member of the United States Army then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing the following statements:

"Dear Geoffrey:

"Let me begin by introducing myself. My name is Howard Levy. I am an Army Dermatologist at Fort Jackson, S.C. . . . I would not attempt to contest your views on the military situation there although I would suggest that you read (if you have not already done so) Jules Roy's book, 'The Battle of DienBien-Phu'. I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those 'people back in the States' who actively opposes our efforts there and would refuse to serve there if I were so assigned. . . .

"The only question that remains, is essentially 1) are we merely naive and therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I am for the second proposition. . . ."

"Is Communism worse than a U.S. oriented Government? . . . Are the North Viet Namese worse off than the South Viet Namese? I doubt it. . . ."

"Geoffrey who are you fighting for? Do you know? Have you thought about it? You're real battle is back here in the U.S. but why must I fight it for you? The

same people who suppress Negroes and poor whites here are doing it all over again all over the world and your helping them. Why? You no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the Viet Namese? A dead woman is a dead woman in Alabama and in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem? Trujillo, Batista, Chang Kai Shek, Franco, Tshombe—BullShit! . . ."

"I would hasten to remind you that despite your obvious courage and enthusiasm Viet Nam is not our country and you are not a Viet Namese. At least the Viet Cong have that on their side. . . . Geoffrey these people may not be sophisticated (American Style) but they're grown men and women who have a right to live and choose their own government. You know they're even allowed to make a mistake—at least let them make it—don't make it for them. . . .",

or words to that effect.

2. Additional Charge III: Violation of the Uniform Code of Military Justice, Article 134

Specification: In that Captain Howard B. Levy, United States Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, with intent to interfere with, impair, and influence the loyalty, morale, and discipline of the military forces of the United States, did at or near Columbia, South Carolina, on or about September 1965, advise, counsel, urge and attempt to cause insubordination, disloyalty and refusal of duty by a member of the military forces of the United States by communicating by mailing the Sergeant First Class Geoffrey Hancock, Jr., a member of the United States military forces then stationed in Viet Nam, and known by the said Captain Howard B. Levy to be so stationed, but not personally known to him, a letter written by his (Levy's) own hand containing statements to the following effect: (1) advocating opposition to the United States involvement in the Viet Nam war; (2) describing

United States foreign policy as a "diabolical evil" designed more to protect selfish American business interests than to contain the threat and aggression of world Communism; (3) characterizing the United States position and policy in Viet Nam as a suppression of Negroes and poor whites; (4) praising Communists, and Communist countries, including North Viet Nam and the Viet Cong as being better than the United States and the United States oriented countries; (5) declaring that he (Levy) would refuse to serve in Viet Nam, and that he has actively opposed the United States involvement in Viet Nam; (6) encouraging Sergeant First Class Geoffrey Hancock, Jr., to give up his involvement and commitment as a United States serviceman fighting in Viet Nam, and to return to the United States to fight for the cause of the suppressed Negroes and poor whites; (7) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr., for fighting with the United States Army in Viet Nam; (8) ridiculing and criticizing Sergeant First Class Geoffrey Hancock, Jr.'s motive for being in Viet Nam, stating that Sergeant Hancock does not have the best interests of the Viet Namese people at heart, in violation of Title 18, Section 2387 United States Code, June 25, 1948, Chapter 645, 62 Statutes 811, amended May 24, 1949, Chapter 139, Section 46, 63 Statutes 96, a Statute of the United States of America.

3. The Letter

1041 Morrison St.
Columbia, South Carolina
9-10-65

Dear Geoffrey

Let me begin by introducing myself. My name is Howard Levy. I'm an Army Dermatologist at Fort Jackson, S.C. I'm a friend of Bill Treanor with whom I've worked during this summer on the SCLC civil rights drive in my spare time.

I've read your letters to Bill & have been especially interested in your views on Viet Nam since I too have had a deep seated interest in the situation there. I would not attempt to contest your views on the military situation

there although I would suggest that you read (if you have not already done so) Jules Roy's book, "The Battle of DienBienPhu." I am, however, deeply distressed at your reasons for fighting in Viet Nam. I am one of those people back in the States who actually opposes our effort there & would refuse to serve there if I were so assigned. I would like to outline some of the reasons for my stance.

Bill has informed me that you are well acquainted with the history of Viet Nam so that I will not cover old ground. I think you would agree that from the time we backed Diem that we have politically not been very astute. The only question that remains, is essentially, 1) were we merely naive & therefore did we make unintentional mistakes or 2) does the U.S. foreign policy represent a diabolical evil. As you would guess, I opt for the second proposition.

I do not believe that you can realistically judge the Viet Nam war as an isolated incident. It must be viewed in the context of the recent history of our foreign policy—at least from the start of the cold war.

Basically there are two arms to our foreign policy—one stated by our State Department & the other unstated 1) The stated part—to contain "Communism" & 2) the unstated part—to support "stable" governments so that our foreign investors may profit. It should be noted that our definition of "Communism" is very, very broad. So broad in fact as to become practically worthless. The record is clear—the U.S. has helped suppress every left liberal revolt that you could name if there was available in the country a "more acceptable" right wing figure who could be more easily manipulated. You see, unfortunately for our government, left liberal governments often have the interests of their countrymen at heart & this runs counter to our interests. For example the Alliance for Progress has been almost a total failure—largely because every time a Latin American government tried to implement a true land reform program (part of the Alliance for Progress program) we have found some reason to balk & not approve the project. This isn't surprising since either U.S. companies own or control much of the land in these countries. Yet without land reform nothing will work in Latin America.

Of course our propaganda mills, the newspapers & the mass media, cover up our sins. Invariably communists are

found to take the blame. Do you really believe that the Dominican Republic was in danger of a Communist overthrow. Responsible non-communist critics in Latin America don't. Juan Bosch said, "these 56 Communists couldn't run a first class hotel let alone a country." He was being generous to the U.S. because later events prove that there weren't even 56 Communists in the country at the time. The same is true in the Congo. Is Tshombe a great patriot? Few in the Congo think so. Yet we support him. Could it be because he can be "counted on"? I think so.

Let's attack it from another, more radical, approach. What if the majority of a people decide that Communism is good for them. Do we, does anybody have a right to deny them this choice. We might disagree emotionally & might try to prove that our way is better but by any stretch of any moral principle can we deny them the choice. Is Communism worse than a U.S. oriented government? The fastest growing economy in Latin America is Cuba. Everybody reads & writes in Cuba. Everybody has medical care. Was this true with the previously American backed government? Not on your life. Is it true in other American backed governments in Latin America? Far East? Near East? Where? The only true examples are Europe & Japan & here only because it served as a bulwark against the Communists. To get closer to home (your home & I hope its temporary) are the North Vietnames worse off than the South Vietnamese? I doubt it. If they are why do so many back the Viet Cong. Guerrilla terriorism? Unlikely. The truth is that the North has instituted land reform, schools & medical facilities (as best as they could in a still very poor country). Why hasn't it happened in the South & why do you insist that it will happen. It hasn't in any of our other colonies. It didn't even happen in the U.S. until the Negro got off his ass & has made it happen. Do you really thing that the big business-military complex in the U.S. are big hearted. They never have been. In the early 1900's labor men & women fought & died for what they obviously deserved—enough food to live. And its still happening. Ask Bill about unions & labor conditions in the South. Well these same companies have vastly more influence on our foreign policy & they're effective.

Geoffrey, who are you fighting for? Do you know? Have you thought about it? You're real battle is back here

in the U.S. but why must I fight it for you? The same people who suppress Negroes & poor whites here are doing it all over again all over the world & you're helping them. Why? You, no doubt, know about the terror the whites have inflicted upon Negroes in our country. Aren't you guilty of the same thing with regard to the Vietnamese? A dead woman is a dead woman in Alabama & in Viet Nam. To destroy a child's life in Viet Nam equals a destroyed life in Harlem. For what cause? Democracy? Diem, Trujillo, Batista, Chiang Kai-Shek, Franco, Tshombe Bullshit?

As I mentioned earlier I don't contest your position that we can win. The question, is win what. If we must destroy a whole people to win then I don't understand the true context of the word. Who are we winning for? The government in Saigon? Which one? It may change before you receive this letter. I would hasten to remind you that despite your obvious courage & enthusiasm, Viet Nam is not our country & you are not a Vietnanese, At least the Viet Cong have that on their side. Or do you take the position that you are the noble white father helping these poor ignorant people? How uplifting it must seem to you. Unhappily its an illusion. These people know more about America & her generosity than you or I—thanks to the American puppets in Saigon. You're no different than the Governor of Alabama telling the Negroes that he has their best interests at heart. Even if it were true, & it is not, it would be a contemptible argument because it's so damn condescending. Geoffrey, these people may not be sophisticated (American style) but they're grown men & women who have a right to live & choose their own government. You know—they're even allowed to make a mistake—at least let them make it—don't make it for them.

I've enclosed an article you might find interesting—maybe it will help explain some of the "morale back home."

I would appreciate your views on some of the points I have raised. In any event let me wish you good luck & safe conduct in your present situation.

Yours truly Howard Levy

EXHIBIT B

Assignment of Error No. 1

The Board of Review erred in upholding the law officer's failure to cause the dimissal of Charge II and additional Charges I, II and III. It also erred in upholding the Court's failure to acquit on Charge II and additional Charges I and II.

1. On Charge II, there was no evidence that the statements of the appellant were made publicly or formally, or were designed to promote disloyalty or disaffection, or had a reasonable probability of causing prejudice to good order and discipline among the troops or, in fact, made a single person disloyal or disaffect (R. 2617-18 and *passim*);

2. On additional Charge I, there was no evidence that appellant so dishonored or disgraced himself that his own character was seriously compromised, or that he so offended against decorum as to disgrace himself as a man, or that he brought dishonor or disrepute upon the military profession or that he was morally unbefitting and unworthy. In addition, the Law Officer's instruction was confusing, prejudicial, and misleading in that it purported to allow a finding of guilt based on standards other than those heretofore enumerated (R. 2597 and *passim*), in violation of the UCMJ, Article 51(c) and the due process clause of the Fifth Amendment of the Constitution of the United States;

3. And regarding Charge II and additional Charges I, II, and III, the alleged statements were protected by Army Regulation 600-20 Paragraph 42, which provides that soldiers retain their right to express their opinions privately and informally on all political subjects.

The Board of Review erred in upholding appellant's conviction having failed to show that statements made by him represented a clear and present danger to good order and discipline in the Armed Forces in violation of the First Amendment and the due process clause of the Fifth Amendment of the Constitution of the United States. (R. 2617-18, and *passim*)

Assignment of Error No. 3

The Board of Review erred in upholding the Law Officer's ruling that the truth or falsity of statements allegedly made by appellant was not an issue and that truth constituted neither justification for nor a defense to Charge II and additional Charges I, II, and III in violation of the First and Fifth Amendments of the Constitution of the United States. (R. 874-77, 2109).

Assignment of Error No. 4

The Board of Review erred in upholding the Law Officer's denial of accused's motion to dismiss Charge II purporting to cite an offense under Article 134, UCMJ, the area of regulation having been preempted by 18 U.S.C. § 2387 (R. 112-15, 126).

Assignment of Error No. 5

The Board of Review erred in upholding the Law Officer's failure to dismiss Charges II, and additional Charges I, II, and III (the "Speech Charges") on the following grounds:

1. Articles 133 and 134 UCMJ (which provide no maximum punishment) and 18 U.S.C. § 2387 under which the speech charges were laid, the charges themselves and the specifications thereunder, are vague and overbroad and void therefore both facially and in their application (R. 137-8, 145-80, 208).

2. Articles 133 and 134 UCMJ failed to apprise appellant of the appropriate standard of conduct required of him, nor was he so apprised by the Army, and, without such notice, he could not be held accountable (R. 2229, 2479-98, 2617-18). All in violation of the First, Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 6

The Board of Review erred in upholding the appellant's conviction, his court-martial being a selective application of military law to silence his expression of dissent over United States policy in Vietnam, in violation of his right to free speech guaranteed by the First Amendment and the equal protection and due process of law guaranteed

by the Fifth Amendment of the Constitution of the United States.

Assignment of Error No. 7

The Board of Review erred in upholding the Law Officer with regard to additional Charges II and III (the "Letter Charges") in that:

1. He failed to dismiss the letter charges on the ground that they constituted an accumulation of charges prohibited by MCM para. 25 at 28, the prosecution having had the document upon which the charges were based substantially prior to the lodging of additional Charge I (R. 94-102);
2. He overruled appellant's motion to dismiss the letter charges or, to remand for an additional Article 32 investigation, which was based on the ground that although the recipient of the letter was totally subject to Army control and could have been provided as an Article 32 witness, he was not so provided, despite repeated requests for him in violation of appellant's rights as provided by the UCMJ and MCM (R. 89-92, 94, 126).
3. He ruled that he would deny a motion for finding of not guilty on those charges even though the evidence was undisputed that (A) the recipient of the letter was not aware that its sender was an officer, (B) no evidence of an intention to make disloyal or disaffect was adduced (C) and the letter was written in response to a request of a friend of the recipient's and was, in fact, in response to a letter from him;
4. He should have dismissed the letter charges since they were totally invalid under AR 600-20;

in violation of the due process of law, fair trial, cross-examination, confrontation and notice provisions of the Fifth and Sixth Amendments of the Constitution of the United States. These errors were extremely harmful to appellant in that they resulted in the presentation to the court-martial of highly prejudicial matter (the letter and its contents), thereby depriving appellant of a fair trial on all charges, due to their consolidation for trial and the failure to grant a severance.

Assignment of Error No. 8

The Board of Review erred in upholding the Law Officer's:

1. Overuling of accused's motion to dismiss Charge II and additional Charge III citing offenses under Article 134 UCMJ for "attacking the war aims of the United States," no

The Board of Review erred in upholding the Law Officer's ruling as a matter of law that appellant had not produced any evidence that the Special Forces of the United States Army were engaged in a pattern or practice of committing war crimes, thereby rendering the order to train Special Forces aidmen which formed the basis for Charge I unlawful on the ground that such trainees would become so engaged or utilize their medical training in an unlawful manner. It further erred in upholding the Law Officer's refusal to allow the court-martial to hear evidence on this issue, appellant having made a prima facie showing of the illegality of the order to train aidmen. (R. 1049)

Assignment of Error No. 9

The Board of Review erred in upholding the Law Officer's failure to dismiss or to properly instruct the court under Charge I that the order to appellant to institute a Phase II training program for Special Forces Personnel was unlawful and the court erred in failing to so find under the First, Fourth, Fifth and Ninth Amendments of the Constitution of the United States, The Order:

1. Required appellant to teach the Art of Medicine to unqualified Combat rather than Medical Personnel;
2. Required appellant to teach medicine to those who planned to use it for purely Military and Political ends;
3. Jeopardized the confidentiality of the Physician-Patient Relationship;
4. Was in violation of an applicable Army Regulation, an applicable technical bulletin and the requirements of good medical practice based thereon; and
5. Violated accepted standards of ethical Medicine and Oaths prescribed therefor.

Assignment of Error No. 10

The Board of Review erred in upholding the Law Officer's ruling as a matter of law that appellant had not produced any evidence that the special forces of the United States Army were engaged in a pattern or practice of committing war crimes, thereby rendering the order to train special AidMen which formed the basis for Charge I unlawful on the ground that such trainees would become so engaged or utilize their medical training in an unlawful manner. It further erred in upholding the Law Officer's refusal to allow the court-martial to hear evidence on this issue, appellant having made a *prima facie* showing of the illegality of the order to train AidMen (R. 1049).

Assignment of Error No. 11

The Board of Review erred in upholding the Law Officer's failure to grant appellant a severance of the charges and separate trials thereon in that:

1. Charge I was unrelated to the remaining 4 charges (the "Speech Charges"), each of which dealt with appellant's highly controversial views;

2. The controversial nature of appellant's political views must, of necessity, have prejudiced the judgment of the members of the court regarding appellant's guilt or innocence under Charge I and the punishment to be provided therefor;

3. Had appellant testified as to either Charge I or the Speech Charges, but not as to both of them, he would have further prejudiced his defense on one or the other or both of them, the result of the Law Officer's error effectively being to deprive appellant of his right to testify on his own behalf and his rights to the due process of law and fair trial guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States. (R. 102-104; 2354-2355)

Assignment of Error No. 12

The Board of Review erred in upholding the Law Officer's failure to dismiss the charges on the grounds that they were facially and factually ex post facto laws and bills of attainder or pains and penalties (R. 203-206, 208).

Assignment of Error No. 13

The Army amassed a 180 page G-2 dossier against appellant. The general court-martial by appellant's accuser was based upon a review of that dossier. Thus the Board of Review erred in upholding the Law Officer in:

1. Denying appellant and his individual counsel access to more than 100 pages of the dossier;
2. Providing the entire dossier to military defense counsel only under the condition that he not divulge to civilian counsel more than the 80 pages thereof released by the Army (R. 56-81; 125-26);
3. Reviewing the dossier *in camera* (R. 86-89);
4. Failing to hold, based *inter alia* on said dossier, that the court-martial was but a device or ruse to rid the Army of an unorthodox thinker, the charges being purely political in origin and based on preservice activities (R. 69-81);
5. Refusing to dismiss the charges on the foregoing grounds upon motion therefor (R. 130-36);
6. Failing to cause the entire G-2 dossier to be made an exhibit to the appellate record (R. 215, 838);

thereby depriving appellant of the rights to free speech, due process of law; to be informed of the nature and cause of the accusation against him; to be confronted by witnesses against him; to have the effective assistance of counsel of his own choosing; the right of compulsory process, and cross-examination and discovery as guaranteed by the Uniform Code of Military Justice, the Manual for Courts-Martial and the First, Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 14

The Board of Review erred in upholding the Law Officer's overruling of accused's objection to:

1. Being tried by a panel of officers in rank superior to him resulting in his being tried by career officers rather than his peers (R. 36-38); from which medical officers were excluded by AR 40-1 para. 9b (R. 36-38); and from which women were systematically excluded (R. 138-45, 208, 213-14);

2. Court member selection without standards and at the sole and absolute discretion of the same commanding general who ordered the court-martial convened (R. 144-45), each of whom was subject to his command, disciplinary and promotional authority (R. 38-40);

3. Who decide whether one of their fellow members is to be disqualified for cause (R. 42-43) contrary to the due process of law and impartial trial guarantees of the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 15

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for a trial by jury in violation of the Fifth and Sixth Amendments of the Constitution of the United States (R. 136-37).

Assignment of Error No. 16

The Board of Review erred in upholding the Law Officer's overruling of:

1. Appellant's objection to the trial counsel's conducting the opening of court, administering of oaths and performance of other administrative duties, all of which place the prosecuting attorney in a preferred position of trust in the eyes of the members of the court, the disparity being exacerbated by reflections upon the understanding of individual counsel and continual re-identification of appellant as the accused (R. 38-40 2145, 2185, 2192, 2248);

2. Appellant's objection to the requirement that the names of those witnesses the defense desired to subpoena be provided the trial counsel who has the power to issue subpoenas for his own witnesses without a showing of relevancy therefor being made, the defense counsel having no such power and, in fact, being required not merely to disclose the names of his witnesses to the prosecution but, more importantly, demonstrate their relevancy and thereby disclose his defense in advance of trial, all of this placing an unequal burden on the defense; (R. 51-56)

In violation of the due process of law, compulsory process and confrontation and fair and impartial trial provisions of the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 17

The Board of Review erred in upholding the Law Officer in:

1. Denying appellant a mistrial based upon the Law Officer's suggestion in the presence of the members of the court that individual counsel "should withdraw from the case" and in
2. His providing a subsequent instruction to the court members, over appellant's objection, that his previous remarks be disregarded,

the prejudicial effect of those remarks being ineradicable from the minds of the court members, the instruction that they be disregarded serving merely to reemphasize the prejudice and to further deprive appellant of his rights to due process of law, the effective assistance of counsel and a fair trial as guaranteed by the Fifth and Sixth Amendments of the Constitution (R. 2191-93).

Assignment of Error No. 18

The Board of Review erred in upholding the Law Officer's overruling of accused's motion that trial counsel be disqualified pursuant to Article 27(A), UCMJ, and paragraph 64, Manual for Courts-Martial, trial counsel having participated in the case previously as investigating officer. (R. 184-201)

Assignment of Error No. 19

Reversible error occurred with reference to the participation of the Staff Judge Advocate in that:

1. The Law Officer erred in overruling appellant's objection that the Staff Judge Advocate (a) conferred with and advised the charging officer to the extent that he became a de facto accuser, (b) appointed counsel for both sides, and (c) made recommendations to the convening authority to proceed by court-martial (R. 46-47); and
2. The Staff Judge Advocate, after participating as aforesaid, and being subject to the command influence of the convening authority, participated in post trial review,

all to the prejudice of appellant and in violation of UCMJ Arts. 6, 34, and 61 and the due process and impartial trial guaranteed by the Fifth and Sixth Amendments of the Constitution of the United States.

Assignment of Error No. 20

The Board of Review erred in upholding the Law Officer's overruling of appellant's objection to the appointment by the convening authority of an Article 32 investigating officer subject to the command, promotional and disciplinary authority of such convening authority, thereby depriving appellant of a fair and impartial Article 32 investigation in violation of the due process clause of the Fifth Amendment of the Constitution of the United States (R. 44, 46-47).

Assignment of Error No. 21

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for change of venue based upon the prejudice and intimidation of Fort Jackson witnesses who could testify on accused's behalf, in violation of the due process clause of the Fifth Amendment and the fair trial provisions of the Sixth Amendment of the Constitution of the United States. (R. 2242, 2245-46)

Assignment of Error No. 22

The Board of Review erred in upholding the Law Officer's failure to declare a mistrial, or in the alternative to order a new trial, on the grounds that during the course of accused's trial the public information officer at Fort Jackson circulated a brochure attempting to rebut an article written by Donald Duncan, a witness for the defense, circulation of such brochure or pamphlet tending to intimidate and discredit the testimony of Donald Duncan thereby depriving accused of a fair trial in violation of the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2246-48)

Assignment of Error No. 23

The Board of Review erred in upholding the Law Officer's overruling of accused's motion for a mistrial on the grounds

that prior to its retirement for sentence Major Boyd D. Parsons, Sr., made statements in open court and in the presence of all other members of the court regarding a telephone call he had received at 12:30 A.M., June 3, 1967, of a threatening or crank nature, such statements related by Major Parsons being so highly prejudicial to accused and impossible of erasure from the minds of the other members of the court as to deprive accused of rights guaranteed by the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2632-33)

Assignment of Error No. 24

The Law Officer erred in overruling accused's objection to the conduct of his Article 32 investiation in secrecy, the press being excluded therefrom in spite of the accused's request that they be present, in violation of the due process clause of the Fifth Amendment and the public trial guarantee of the Sixth Amendment of the Constitution of the United States (R. 47, 125).

Assignment of Error No. 25

The Board of Review erred in upholding the Law Officer's ruling that the testimony of Colonel Richard L. Coppedge was inadmissible except as to extenuation and mitigation, and by further ruling inadmissible as to extenuation and mitigation the testimony of Colonel Coppedge concerning the possible effects upon morale and discipline in the Army of accused being sentenced to confinement, in violation of the rules of evidence and the due process clause of the Fifth Amendment and the Sixth Amendment of the Constitution of the United States. (R. 2539)

Assignment of Error No. 26

The Board of Review erred in upholding the Law Officer's overruling of accused's motion that he be provided with copies of statements from certain enlisted personnel accused allegedly conversed with, such statements having been compiled by trial counsel and withheld from accused in violation of his rights of discovery under the UCMJ and MCM, and the suppression thereof being in violation

of the due process clause of the Fifth Amendment and the fair trial provisions of the Sixth Amendment. (R. 202)

Assignment of Error No. 27

The Board of Review erred in upholding the Law Officer's failure to give defense proposed instructions 1 through 14 in their entirety. (R. 2525-27, Appellate Exhs. 24, 25).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,

PETITIONER,

v.

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,

RESPONDENTS.

No. 1057 H.C.

[Filed Apr. 19, 1969]

T. H. Campion, Clerk
Per .....
Deputy Clerk

MOTION FOR PRODUCTION OF DOCUMENTS

Petitioner Howard B. Levy moves the Court for an order or appropriate writ requiring respondents to produce and pemit inspection by Counsel of the originals of each of the following sets of documents at a time and place to be specified by (and under the terms and conditions of) an appropriate order to be entered by the Court.

Petitioner further moves the Court to require respondents to furnish copies of said documents to Petitioner's Counsel or to allow such Counsel to reproduce said documents by photographic or other means.

I. This Motion is based upon:

1. This Court's power to see that "law and justice" are done, 28 U.S.C. § 2243;
2. The present intention of Petitioner to introduce the hereinafter described G-2 Dossier, in toto, in evidence in this proceeding;
3. The inherent power of the Court to order production;
4. The entire G-2 Dossier is essential proof of the denial to Petitioner of his first, fourth, fifth, sixth and ninth amendment rights;
5. Additionally the G-2 Dossier and the other documents (questionnaires hereinafter described) hereby sought are subject to production for discovery purposes under:

(a) the inherent power of the Court to order discovery;
(b) the provisions of 28 U.S.C. § 2243;
(c) the provisions of 28 U.S.C. § 2246;
(d) the provisions of 28 U.S.C. § 1651;
(e) Fed. R. Civ. P. 34;
(f) Fed. R. Crim. P. 16(b)

II. The sets of documents sought are:

(1) the G-2 Dossier (intelligence dossier referred to in the petition for writ of habeas corpus filed herein and in court-martial proceedings styled *United States* v. *Captain Howard B. Levy*, (No. CM 416463)) consisting of approximately 180 pages; and,
(2) the approximately 450 questionnaires forwarded to military personnel or others by the Government (with written responses thereon or replies thereto, if any), during or prior to said Court-martial proceedings. The questionnaires were utilized for the purpose of eliciting evidence and possible witnesses to the words allegedly uttered by Petitioner or for the purpose of ascertaining his political or other views on racial and Vietnam questions or otherwise.
(3) the correspondence or other records; documents or files in the possession of the Government relating to Dr. Levy and not contained in items (1) and (2) above but which relate thereto.

III. Respondent Resor, as Secretary of the Army, has the possession, custody or control of the foregoing.

IV. The documents and other matter are relevant on the following grounds:

(1) the Special Agent who compiled the Dossier or a major portion thereof (the entire Dossier being compiled by him and his co-workers) on or about October 2, 1966, caused the issuance of an order to Dr. Levy with the disobedience of which he was later charged under Article 15, UCMJ, 10 U.S.C. § 815, which provides for but minor and non-judicial punishment.
(2) Col. Henry Franklin Fancy, Dr. Levy's com-

manding officer, later elevated the Article 15, *supra,* charges to General Court-Martial level based upon his reading of the entire Dossier.

(3) prior to and at trial the Government withheld and suppressed approximately 100 pages of said Dossier from Dr. Levy's Chief Defense Counsel, the undersigned Charles Morgan, Jr., revealing to him but 80 of 180 Dossier pages. Repeated demands were made for the production of the entire Dossier they being based on the first, fourth, fifth and sixth Amendments of the Constitution of the United States. The Government contended that the suppressed portions of the Dossier were of a classified nature and that it was acting in compliance with the Jencks Act, 18 U.S.C. § 3500. Chief Defense Counsel for Dr. Levy specifically rejected the Jencks Act, *supra,* as the grounds for production of the documents relying instead on Constitutional guaranties, thereby complying with the mandate of *United States* v. *Augenblick,* 89 S. Ct. 528 (1969). He additionally represented that he could obtain an appropriate security clearance.

(4) Military Defense Counsel, assistant counsel in the trial, was allowed to view the entire Dossier as were Prosecutors, the Colonel who instituted the charges, that Colonel's Executive Officer, and the Law Officer.

(5) Military Defense Counsel, assistant counsel in the trial, was not allowed to request agent's statements from the Dossier, and was not allowed to, nor did he, reveal to Chief Defense Counsel the matter contained in the Dossier's suppressed 100 pages. The matter contained in the Dossier was classified no higher than "Confidential." See Exhibit C, Affidavits, 50.

(6) the very charges against Dr. Levy having been based on the Dossier, a specific rejection of the Jencks Act, *supra,* and representations having been made by said Chief Defense Counsel that the charges against Dr. Levy were based in part on his pre-service political activity *Cf. Harmon*

v. *Brucker,* 355 U.S. 579 (1958), and, additionally, his racial and political views *Cf. United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Lenske* v. *United States,* 383 F.2d 20 (9th Cir. 1967)[1] the following occurred after trial and exhaustion of all intra-military remedies herein:

> Chief Defense Counsel, Charles Morgan, Jr. applied for clearance to review the Record of another trial by Court-martial. On February 25, 1969, said counsel was granted the appropriate security clearance. Matter contained in that Record is classified "Top Secret," the Army's highest security designation. See Exhibit C, Affidavits, 133. The same clearance was granted associate counsel herein, Reber F. Boult, Jr., Esq.

(7) although a request was made that a copy of the entire G-2 Dossier, sealed, if necessary, be made a part of the Record for appellate purposes this was not done.

(8) approximately 450 questionnaires were mailed by the Government—petitioner is informed and believes that this was done even prior to the convening of the Court-martial—to sundry military and non-military personnel including Dr. Levy's patients. Many of these forms were filed out in the handwriting of the recipients thereof and returned to the Government. The defense sought these documents in order to demonstrate Dr. Levy's innocence of the four pure speech charges which were based upon his having made statements "publicly" to "divers" persons. The Government provided only

---

[1] See particularly the Additional Separate Opinion of Madden, J., 383 F.2d at 27 discussing the fact that the prosecution had its genesis in the unpopularity, in the eyes of federal and local law enforcement officials, of Lenske's political views and activities. This was revealed by a "Special Agent's report," *id.* at 28, which two of the court members felt had not been properly introduced and hence could not serve as the basis for decision; nevertheless one of the other court members "shares [Judge Madden's] opinion," *id.* It was because the Agent's report was not properly made a part of the record that an earlier opinion, incorporating Judge Madden's additional opinion and published at 18 *Am. Fed. Tax R.* 5815 (1966), was withdrawn. See *id.* at 27.

the completed questionnaires of those persons it intended to use as witnesses relying on the Jencks Act, *supra,* which was not invoked the defense relying once again on constitutional grounds. The Government also professed a lack of knowledge as to whether it had in its possession matter which was privileged as work product or evidence and, no independent determination or examination of these documents was made even *in camera* and they too were suppressed. At trial the following was shown:

(a) Petitioner had a minimum of 17,500 patient visits during each of his 2 years in the service;

(b) Of the approximately 13 "divers" Government witnesses to Dr. Levy's conversations only one of them had overheard or engaged in as many as 4 conversations during which Dr. Levy was supposed to have uttered forbidden words, and he had worked in his clinic for more than a year, one other witness had talked with him on fewer occasions, and several had participated in but a single conversation.

(9) Throughout the trial and pre-trial proceedings Dr. Levy sought to subpoena G-2 and Judge Advocate officers with whom the charging officer, Col. Fancy, had conferred—with one of them 12 times about Dr. Levy himself. Certain notes of persons who were produced at trial as witnesses had been "destroyed" or "burned." The correspondence or documents or other records in the possession of the Government which are not included in the sets of documents sought in II (1) and (2) may be as relevant, if not more, to the matter at issue than the sets of documents otherwise sought.

V. Further grounds for production of the documents here sought appear on the face of the Petition for Writ of Habeas Corpus filed herewith, the Brief filed herein and in Exhibit B, thereto, the Affidavits,

and the Appendices filed herewith. In addition to the matter set forth in the Brief in this cause a separate memorandum of authorities relating to this motion is attached hereto.

s/ Charles Morgan, Jr.
CHARLES MORGAN, JR., Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY,
PETITIONER,

v.

JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army,
RESPONDENTS.

NO. _____

Additional Memorandum Regarding

the

Production of Documents

Other than the grounds set forth in the Motion for Production of Documents the following is applicable:

> . . . [W]hen the court considers that it is necessary to do so in order that a fair and meaningful evidentiary hearing may be held so that the court may properly "dispose of the matter as law and justice require" . . . it may issue such writs and take or authorize such proceedings with respect to development, before or in conjunction with the hearing of the facts relevant to the claims advanced . . . .
>
> • • •
>
> . . . . [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry. *Harris v. Nelson*, 37 U.S.L.W. 4219, 4223 (U.S. Mar. 24, 1969)

See also *Kaufman v. United States*, 37 U.S.L.W. 4238 (U.S. Mar. 24, 1969). *Alderman v. United States*, 37

U.S.L.W. 4189, 4195 (U.S. Mar. 10, 1969), a fourth amendment case requiring production of materials, states:

> . . . the trial court can and should, where appropriate, place petitioner and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect.

But this is not merely a fourth amendment case. The first, fifth, sixth, and ninth amendments are also involved. Decisions subsequent to *Alderman* are not restrictive of counsel's rights, no matters of national security can be plausibly asserted, and this Court's order should issue to see that law and justice are done.

Respectfully submitted,

CHARLES MORGAN, JR.
REBER F. BOULT, JR.
MORRIS BROWN
Five Forsyth Street Northwest
Atlanta, Georgia 30303

LAUGHLIN MCDONALD
17 South Circle Drive
Chapel Hill, North Carolina

GEORGE W. DEAN, JR.
P. O. Box 248
Destin, Florida

AMBROSE CAMPANA
36 West Willow Street
Williamsport, Pennsylvania
Attorneys for Petitioner

ANTHONY G. AMSTERDAM
School of Law
University of Pennsylvania
Philadelphia, Pennsylvania

ALAN H. LEVINE
BURT NEUBORNE
ELEANOR HOLMES NORTON
MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

HOWARD B. LEVY, PETITIONER, v. JACOB J. PARKER, as Warden of the United States Penitentiary, Lewisburg, Pennsylvania, and STANLEY R. RESOR, as Secretary of the Army, RESPONDENTS.	No. 1057 H.C.

DISCLOSURE OF INFORMATION OBTAINED BY EAVESDROPPING

Petitioner moves, pursuant to Federal Rule of Criminal Procedure 16, (including the continuing duty of disclosure as provided by Rule 16(g)), the inherent power of this court to require discovery, disclosure and production of documents, and the first, fourth and sixth amendments and the due process and self-incrimination clauses of the fifth amendment of the Constitution of the United States, for an order requiring the United States through the United States Attorney for the Middle District of Pennsylvania and military counsel assigned to this case and any other proper officer(s) or official(s) of the Government to produce and permit the petitioner and his counsel to inspect and copy all records, memoranda, and other writings, recordings, or other electronic surveillance of the petitioner, his place of work or residence or any other place frequented by him including but not limited to hotels or motels, and of attorneys, or conversations to which he or they participated in and the use, transmission, and disposition thereof (if any such surveillance has occurred prior to the filing of this motion). Such disclosure shall include but not be limited to production of the following without regard to the legality of the surveillance:

1. The logs of the conversations, showing by whom and by what agency such logs were compiled.

2. The actual tapes or other recordings of the conversa-

tions and transcriptions thereof whether by stenographic or other means and the names of the persons and agencies who monitored the conversations.

3. The names of the persons participating in the conversations which were overheard.

4. The dates, times, and durations of the conversations overheard.

5. The place or places at which the surveillance took place and the methods or techniques and electrical, electronic, or other devices used.

6. The duration of the surveillance of each place or person.

7. The names of all persons and agencies who had access to the information obtained by the surveillance whether or not such information was actually transmitted to them, as well as the names of the persons or agencies to whom the information was actually transmitted.

8. A detailed specification of the purpose of the surveillance.

9. The uses to which the information obtained was put.

10. The names of persons and agencies who have had custody, control, or access to the recordings, logs and summaries and the dates of such custody or control.

11. All communications pertaining to such surveillance and all memoranda prepared in connection therewith and any warrants or other written authorizations providing for the conduct of the surveillance.

12. No showing of relevance is necessary under *Alderman v. United States,* 89 S. Ct. 961 (1969) to require the disclosure of information gained as a result of electronic or other illegal surveillance. And, in any event, the fact of the surveillance must be disclosed so that the determination of whether the surveillance was lawful or, if unlawful, whether the conviction of petitioner was tainted thereby can be made.

13. If such matter exists petitioner requests that it be disclosed to his counsel of record and not filed in open court in these proceedings.

14. Disclosure of the matter sought by this motion (if any such matter exists) is necessary to assure defendant's rights to: be free from unreasonable searches and seizures guaranteed by the fourth amendment of the Constitution of

the United States; the due process and equal protection of law guaranteed by the fifth amendment; the fair trial guaranteed by the fifth and sixth amendments; know the nature and cause of the accusation; confrontation; compulsory process; have the adequate assistance of counsel; and to protect the freedom of speech, and assembly guaranteed by the first amendment thereof. Additionally such disclosure is required in order that the petitioner not be deprived of his right to a judicial trial as guaranteed by Article III, Section 2 of the said Constitution. The materials are available under Federal Rule of Criminal Procedure 16(b) and to the extent that it is a "written or recorded statement . . . made by the defendant . . ." under Rule 16(a).

CHARLES MORGAN, JR.
REBER F. BOULT, JR.
MORRIS BROWN
Five Forsyth Street Northwest
Atlanta, Georgia 30303

LAUGHLIN MCDONALD
17 South Circle Drive
Chapel Hill, North Carolina

GEORGE W. DEAN, JR.
P. O. Box 248
Destin, Florida

AMBROSE CAMPANA
36 West Willow Street
Williamsport, Pennsylvania
Attorneys for Petitioner

ANTHONY G. AMSTERDAM
School of Law
University of Pennsylvania
Philadelphia, Pennsylvania

ALAN H. LEVINE
BURT NEUBORNE
ELEANOR HOLMES NORTON
MELVIN L. WULF
156 Fifth Avenue
New York, New York 10010
Of Counsel

Protective Order of Production

To counsel of record for the respondents in this cause:

You are hereby ordered to disclose the matter sought in the above and foregoing Motion for Disclosure of Information Obtained by Eavesdropping to counsel of record for the petitioner herein and to no other persons. Such disclosure shall be made at a time and place mutually convenient to counsel for the parties. In no event is any of the matter so disclosed to be filed in this Court or otherwise made public without obtaining the prior approval of this Court.

If none of the matter sought in said Motion exists then you are hereby ordered to certify that fact to this Court in writing with service of a copy of such certification upon petitioner's counsel of record.

Entered this the —— day of July, 1969.

MICHAEL H. SHERIDAN
Chief Judge
United States District Court

SUPREME COURT OF THE UNITED STATES

No. 73-206

JACOB J. PARKER, Warden, et al.,
Appellants,

v.

HOWARD B. LEVY

APPEAL from the United States Court of Appeals for the Third Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The case is set for oral argument in tandem with No. 72-1713.

October 23, 1973

☆ U.S. Government Printing Office: 1973—528-624/137